73-137

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-137

TONY RICE, GEORGE W. ZARAK, ARLENE ZARAK, WILLIAM ZARAK, JR., and DARLENE ZARAK,

Petitioners,

vs.

UNITED STATES OF AMERICA; ROGERS C. B. MORTON, As Secretary of the Interior; BURTON W. SILCOCK, Director of Bureau of Land Management; EDWIN ZAIDLICZ, State Director, Bureau of Land Management; EUGENE NEWELL, Chief, Division of Technical Services, Bureau of Land Management; and BURLINGTON NORTHERN, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners above named respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 20, 1973.

DECISIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not, as of this date, been reported. A copy of the slip opinion as received from the court is attached to this Petition as Appendix A. The opinion of the United States District Court for the District of North Dakota is reported as *Rice* v. *United States,* 348 F. Supp. 254. That case upheld a split decision of the Board of Land Appeals, Department of the Interior, decided November 10, 1971, and a copy of that decision is attached to this Petition as Appendix B.

JURISDICTION

The judgment of the Eighth Circuit Court in this case was dated and entered April 20, 1973. No rehearing has been requested and no extension of time within which to petition for certiorari has been requested. However, under 29 USCA 2101(c) this Court has jurisdiction to review said judgment by writ of certiorari upon a petition being filed within ninety (90) days from the entry of judgment.

Jurisdiction of the Federal Court in the first instance was authorized under 30 USC 226-2 which authorizes appeals of this nature from the granting of oil and gas leases by the Bureau of Land Management.

QUESTIONS PRESENTED

There is just one question presented. That concerns the ownership of oil and gas minerals under the right-of-way of the Burlington Northern, Inc. traversing land granted without restriction or reservation by the United States to homestead patentees. This question has never been previously litigated in the Federal Courts. The lower courts in this case have determined that those minerals were retained and always have been owned by the United States, notwithstanding the unrestricted patent grant. The petitioners contend that the oil and gas minerals under the right-of-way were conveyed by the United States to the original homestead patentees by patents issued in 1904 and 1910, each of which described and conveyed a full 160 acres, including the land involved with the right-of-way of the railroad which was then constructed and existing.

Although the Burlington Northern, Inc. has no direct claim of ownership to these oil and gas minerals, its interest in the matter is that if those minerals are owned by the United States the railroad would then have the preferential right to lease the oil and gas under its own right-of-way.

STATUTES INVOLVED

A. *The Homestead Act of May 20, 1862. 12 Stat. 392.* That provided the granting of *160 acre tracts* to homestead patentees for agricultural purposes and the land involved in this case was conveyed pursuant to that Act. No provision was made for the

reservation of any minerals either in the Act or in the patents issued pursuant thereto and no mention in either was made concerning railroad rights-of-way. The statute authorizes a full conveyance in fee and the patents were issued accordingly. The Act specifically provides that the land to be conveyed must be contiguous as shown by the phrase: "to be located *in a body* in conformity to the legal subdivisions of the public lands". Sections 1 and 2 of this Act are attached hereto as Appendix C.

B. *Northern Pacific Right of Way Act of July 2, 1864. 13 Stat. 365.* Section 2 of this Act grants a right-of-way to the Northern Pacific, now Burlington Northern, Inc., to be located along the path to be selected by the railroad. Section 3 of that Act provides the grant in fee to the title to alternate (odd-numbered) sections of land to subsidize the building of the railroad. As determined in *United States* v. *Union Pacific Railroad Company*, 77 S.Ct. 685, Section 2 did not grant the railroad any oil or gas rights. They were retained under the right-of-way with the rest of the surface and minerals in the legal subdivisions which, in this case, were quarter sections (160 acres). The property in this case was in an even-numbered section. Therefore, Section 3 (the land grant) has no applicability and this decision is concerned only with Section 2. The full content of Sections 2 and 3 of this Act are attached hereto as Appendix D.

STATEMENT OF THE CASE

The actual question involved in this case is the legality of the granting of an oil and gas lease by the United States, through the Bureau of Land Management of the Department of Interior, on the petitioners' property under the assumption that the United States is the owner of the oil and gas under the railroad right-of-way. The final determination of the propriety of granting that lease is and will be tantamount to the determination of the ownership of oil and gas under the right-of-way as between the United States and these petitioners who admittedly are the successors in interest to the original homesteaders. Burlington Northern, Inc. no longer claims title to these minerals but does claim the lucrative, preferential right to lease these properties and that right is dependent upon ownership by the United States. The decision of the Eighth Circuit affirms that of the lower court and that of the Board of Land Appeals and holds that the oil lease granted by the United States under the right-of-way traversing the petitioners' property is valid.

The actual acreage involved in this dispute is 37.03 acres in a strip 400 feet wide across the N½ of Section 8-T139N-R98W, Stark County, North Dakota. However, the question is one of extremely broad application since it is strictly a matter of interpreting the Homestead Act and the Railroad Right of Way Act above referred to. Much more than this one tract of land is involved since the same question is presented over the entire right-of-way of the Burlington Northern, Inc. extending from Lake Superior to Puget Sound and the identical question is also presented in connection with the numerous other land grant railroads including the Union Pacific and the numerous other railroads that were granted rights-of-way under

Acts of Congress with identical wording. See reference to various land grant railroads at page 690 of *United States* v. *Union Pacific Railroad Company*, supra.

Although the property value involved in this particular case, and as to each individual landowner similarly situated, is relatively small, the collective property rights involved are very substantial. This is not a class action although it has many of the attributes of one since these petitioners are in the identical position as are all owners of original homestead property traversed by rights-of-way of land grant railroads throughout the western reaches of the United States.

This right-of-way was granted to the Northern Pacific Railway Company, the predecessor of Burlington Northern, Inc., under the Act of July 4, 1864 (13 Stat. 365). The railroad then selected its route and the main line of the railroad was constructed over the property involved in the early 1880's, long before the advent of homesteaders in that area.

Later, this property which includes the 37.03 acres of right-of-way, was conveyed to homesteaders with two separate patents issued pursuant to the Homestead Act of 1862 (12 Stat. 392) as follows:

1. Patent dated February 25, 1904, conveying the S½ NE¼ and N½ SE¼ in said Section 8 to Bartholomew O'Connell. That patent was without any reservation of any minerals and did not except or even refer to the railroad right-of-way. Further, it specifically stated that it conveyed 160 acres to the patentee which, as provided by the statute, had to be *in a body*.

2. Patent dated February 23, 1910, conveying the N½ N½ of said Section 8 to Samuel W. Gillman.

> Other aspects of the patent were identical to the one to Bartholomew O'Connell with no reservation of minerals, no reference to the railroad right-of-way and specific representation that it conveyed 160 acres to the patentee.

There is no dispute as to the content of these two patents. However, photographic copies have been made and are attached hereto as Appendix E.

It is acknowledged by all that these patents generally did convey all mineral rights, including oil and gas, from the United States to the homestead patentees and such minerals have now passed on to these petitioners, but as to the 37.03 acres underlying the right-of-way strip, the lower courts have held that the oil and gas thereunder were never conveyed by these patents and are still the property of the United States.

The holding of the lower courts in this case is that there is a special rule applicable here which denies the landowners these mineral rights and which enables the United States to deny this portion of the title apparently conveyed by those patents.

There are no questions of fact in this case and the decision turns entirely on the construction and application of the Homestead Act and the Railroad Right of Way Act, supra.

It is acknowledged by all that the oil and gas under this right-of-way was never conveyed to the railroad. However, the lower courts have held that such minerals are still vested in the United States and that, therefore, the land that actually passed with the patents consists of the fee title, surface and minerals, of separate tracts on either side of the railroad right-of-way with no interest whatever being vested in the homestead patentees or their

successors in the 400 foot right-of-way strip. Therefore, the lower courts have determined that the homestead patents in these cases conveyed ownership of two separated tracts in each case, the separation consisting of a 400 foot wide strip of surface and minerals dividing each governmental subdivision from east to west, notwithstanding the mandate in the Homestead Act that the land was to be conveyed *in a body*.

REASONS FOR GRANTING THE WRIT

This is a case in which special and important reasons exist for review, determination and clarification by the United States Supreme Court. The question is one which affects valuable and widespread property rights and affects the rights of numerous property owners throughout various areas of the United States where rights-of-way of land grant railroads exist. In this case there is a producing oil well taking production from the property involved and even in situations where there is no existing production, the cumulative property values hinging on the point of this lawsuit are considerable.

This is a classic case of a few small landowners taking on the most powerful of opponents and seeking equal consideration on this important question before the highest Court in the land.

None of the parties to this lawsuit has been able to locate any prior Federal Court decision determining this vital property question and because of its importance and widespread application, it is vital that it be settled now by the Supreme Court of the United States.

The decision of the Circuit Court is such that it is inconsistent with the 1957 decision of this Court, *United*

States v. *Union Pacific Railroad Company*, supra. The lower court has ignored that case and has resurrected the much older, and now inapplicable, decision of *Northern Pacific Railway* v. *Townsend*, 190 U.S. 267 (1903). By refusing to accept the full scope of the *Union Pacific* case, supra, and in declining to acknowledge that the *Townsend* case is no longer applicable on this question of underlying minerals, the Circuit Court has rendered its decision in this case in conflict with the existing and prevailing law of this Court.

It is important to note that the fact situation in the instant case is different from those in *Union Pacific* and *Townsend*, supra, but the principles set forth in those cases have some application here. What is needed is a definitive decision in this case reaffirming the *Union Pacific* decision and applying it for the first time to land conveyed originally by the United States by a homestead patent. The land in the *Union Pacific* case was not homestead patent land but was property that remained vested in the United States. Therefore, that decision decided only the ownership of oil and gas as between the United States and the land grant railroad. The next question, never previously presented to this Court, is to determine what happened to the oil and gas under the right-of-way when the unrestricted homestead patent was subsequently issued by the United States to the homesteader.

There is no statute that justifies the lower court ruling and none is claimed to exist by the respondents. Their entire claim rests on the perpetuation of verbiage from the *Townsend* case from which it is concluded that the oil and gas under the right-of-way was retained forever by the United States notwithstanding the issuance of unrestricted patents covering the entire governmental subdivision.

This application of *Townsend* by the lower court is clearly erroneous and ignores the following facts:

1. *Townsend* did not involve oil and gas or any mineral interest but concerned a surface invasion only. We do not argue with the result in *Townsend* but point out that it has no applicability to a mineral question and that much of the reasoning contained therein has since been discarded by this Court in *Union Pacific,* supra.

2. Prior to *Union Pacific* the courts generally, including the Supreme Court of the United States, did support the contention of land grant railroads that they owned all minerals under the right-of-way and that right-of-way really meant complete fee ownership. However, that position was reversed by *Union Pacific* in 1957 and, to the extent that *Townsend* could be made applicable to a mineral case, *Townsend* was overruled. Nonetheless, rather than citing and following the modern Court with its 1957 *Union Pacific* decision, the lower courts in this case have followed the contention of the Burlington Northern and of the United States and have adhered to the *Townsend* case on this oil and gas question.

3. This Court in the *Townsend* case definitely determined that the railroad owned the surface and minerals, including oil and gas, in the right-of-way strip as summarized in the following quote taken from page 271 of that decision:

> "It must be held that the *fee* passed by the grant made in Section 2 of the Act of July 2, 1864."

That is no longer the law of this Court. However, it is obvious that the lower court in this case is attempting to perpetuate that same conclusion by

following *Townsend* blindly and in stating that the entire fee comprising the right-of-way strip, upon the grant of the right-of-way, was taken out of the category of public land available for conveyance to homesteaders and that, therefore, it could not have been conveyed to the homesteaders notwithstanding the unambiguous provisions in the land patents involved.

4. The result in *Townsend* was not to leave any portion of the right-of-way vested in the United States but was to grant it all to the railroad, leaving none for conveyance to the homesteader.

5. The net result in this decision of the Circuit Court is to give the railroad only the surface easement, give absolutely nothing to the homesteaders, and to reserve all of the rest of the title in the right-of-way to the United States including oil, gas and any revisonary interest. That result is illogical, is not contemplated by any of the statutes involved, and permits the United States to openly deny the title obviously granted in the land patents and to blatantly breach its warranty to the homesteaders.

6. Nothing in the statutes require or suggest that the United States intended to retain minerals under the right-of-way. Further, the Homestead Act specifically stipulates that these patents are to convey 160 acre tracts *in a body*, whereas the result of this decision is to completely divide the homestead tracts by the right-of-way strip and to convey two separate pieces rather than one.

The key phrase from the *Townsend* case which has been blindly followed by the lower courts in this case is found at page 270 of that decision as follows:

> "The land forming the right-of-way therein was taken out of the category of public lands subject to preemption and sale, and the land department was, therefore, without authority to convey rights therein."

The following quotes are also taken from that same decision, clearly showing that the Court at that time considered the grant of the right-of-way to be the complete conveyance in fee:

> At page 271: "It must be held that the fee passed by the grant made in Section 2 of the Act of July 2, 1864."
>
> At page 272: "The whole of the granted right-of-way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

Subsequently, the *Union Pacific* decision, after referring to the *Townsend* case and its limited fee doctrine, correctly defined the right-of-way as meaning just that, a right-of-way or surface easement and held that the land grant railroads (the Union Pacific in that case) received no interest in oil and gas but that such were retained by and vested in the United States. At that point, in 1957, this Court overruled *Townsend* and made it inapplicable to any oil and gas question. Once that obvious and basic distinction between *Townsend* and *Union Pacific* is recognized, there is no logic whatever in contending that the unrestricted land patents granted to the homesteaders in this case did not include the oil and gas and all other interests then owned by the United States.

Although later legislation did provide for the reservation of minerals by the United States, the patents involved

in this case were issued prior to the onset of any such law and there is no authority justifying the conclusion that the United States retained the oil and gas in this property.

The lower courts have adopted phraseology from *Townsend* and have ignored the reality of the *Union Pacific* decision.

The result here is to leave the United States as the mineral owner under this and all other right-of-way property similarly situated whereas such was never intended by Congress and has never been decreed by any prior Federal Court decision.

Our position heretofore has been that the *Union Pacific* case adequately overruled *Townsend* insofar as any application to oil and gas cases is concerned but obviously the lower courts do not share our view. It is clear from a reading of the *Union Pacific* decision, however, that the *minority* opinion, which held for the railroad's contention of fee ownership by the railroad, was endorsing the *Townsend* case as shown in the following quote from page 691:

> "Northern Pacific R. Co. v. Townsend * * * made even more plain the Court's view that when Congress in the 1860's granted a railroad right-of-way it conveyed the entire present interest in the strip of land."

That minority view was rejected and accordingly the statement from *Townsend* that the land encompassing the right-of-way was no longer available for conveyancing became inapplicable. Since the railroad didn't get the minerals there is no reason why the unrestricted land patents should not convey them to the homesteaders.

The *Townsend* case is now 70 years old. We acknowledge that it still has applicability to a direct surface in-

trusion on right-of-way property but in view of the subsequent rejection of the limited fee doctrine and of the application of that case to a mineral question, it is advisable that this Court grant certiorari and issue a definitive opinion which, in addition to deciding the issues in this case, could clarify the now limited applicability of *Townsend* and reconcile the *Townsend* and *Union Pacific* decisions, especially insofar as they may apply to oil and gas ownership in this type of situation.

In conclusion the reasons for granting this writ of certiorari include:

1. The question is one of extremely broad application involving innumerable property owners and, collectively speaking, substantial property rights under all land grant railroads.

2. The lower court has misconstrued the *Townsend* case, supra, as well as the Homestead Act of 1862 and the Northern Pacific Railroad Right of Way Act of 1864 and, therefore, has decided this important Federal question in a way which is in conflict with existing statutes and the prior decision of this Court. (The *Union Pacific* case, supra).

3. The precise question involved here has never previously been settled by the Supreme Court and should now be clarified and determined, especially in view of the now apparent conflict and misapplication of law of the lower court.

4. The result obtained in the lower court is illogical, unfair to the homestead patentees, permits the United States to violate its covenant of warranty to the homesteaders, and leaves the United States as the owner of minerals not intended to be reserved.

Wherefore, the petitioners respectfully request that favorable consideration be given to this petition and that the writ of certiorari herewith requested be granted so that a full hearing and determination of this vital issue may be obtained.

Dated at Dickinson, North Dakota, this 5th day of June, A.D., 1973.

Respectfully submitted,

GEORGE T. DYNES
Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1738

TONY RICE, GEORGE W. ZARAK, ARLENE ZARAK, WILLIAM ZARAK, JR., and DARLENE ZARAK,

Appellants,

v.

THE UNITED STATES OF AMERICA; ROGERS C. B. MORTON, AS SECRETARY OF THE INTERIOR; BURTON W. SILCOCK, DIRECTOR OF THE BUREAU OF LAND MANAGEMENT; EDWIN ZAIDLICZ, STATE DIRECTOR, BUREAU OF LAND MANAGEMENT; EUGENE NEWELL, CHIEF, DIVISION OF TECHNICAL SERVICES, BUREAU OF LAND MANAGEMENT; and BURLINGTON NORTHERN, INC.,

Appellees.

Appeal from the United States District Court for the District of North Dakota, Southwestern Division.

Submitted: March 15, 1973
Filed: April 20, 1973.

Before MATTHES, Chief Judge, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM.

This is an action brought by appellants to review a decision of the Board of Land Appeals approving the grant of an oil and gas lease on Burlington Northern, Inc.

railroad right-of-way in Stark County, North Dakota. Judge Van Sickle entered judgment affirming the decision of the Board of Land Appeals. We affirm.

The predecessor to Burlington Northern, Inc., Northern Pacific Railway Co., was granted a 400-foot wide strip of land from Lake Superior to Puget Sound under an Act of Congress passed July 2, 1864. This 400-foot wide strip passed through Section 8, Township 139 North, Range 98 West of the 5th P.M. in Stark County, North Dakota. In 1904 and in 1910 patents were issued to Mr. O'Connell and Mr. Gillman for 160-acre tracts of land within said Section 8. Although the railroad right-of-way crossed those two tracts, no mention was made in the patents of the railroad right-of-way or of the mineral rights attendant thereto. The appellants are successors in title to Mr. Gillman and Mr. O'Connell.

No question is raised as to the ownership of the right-of-way, as such, but appellants claim to own the oil and gas rights under the right-of-way. Their theory is that under *United States* v. *Union Pacific R.R.*, 353 U.S. 112 (1957), title to oil and gas rights did not pass from the United States, to Northern Pacific, and that since the descriptions in the patents given their predecessors in title included the entire 160-acre tracts without excluding the railroad right-of-way, they are the lawful owners of all of the interest that the United States retained in the railroad right-of-way, including oil and gas rights.

The trial court held that under *Northern Pacific Ry.* v. *Townsend*, 190 U.S. 267 (1903) the 400-foot strip of land conveyed to the railroad was taken out of the category of public land subject to preemption and sale and that the land department therefore could not have conveyed any interest in it to the appellants' predecessors in title when the patents were issued.

We have carefully considered the record and the briefs of the parties and conclude that the trial court correctly decided the factual and legal issues presented. We therefore affirm on the basis of Judge Van Sickle's well-reasoned memorandum opinion. *Rice* v. *United States,* 348 F.Supp. 254 (D.N.D. 1972).

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

In Reply Refer to:

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

IBLA 71-2 71-185	: M 15377, M 15944
	: Protests against
	: oil and gas leases
GEORGE W. ZARAK ET AL. CARDINAL PETROLEUM COMPANY	: dismissed
	: Affirmed

DECISION

George W. Zarak and others[1] appeal to the Board of Land Appeals from a decision dated July 15, 1970, in

1. This appeal has been taken in the names of George W. Zarak, Arlene Zarak, William J. Zarak, Jr., Darlene Zarak, and Toney Rice.

which the Montana land office of the Bureau of Land Management dismissed their protest against issuance of oil and gas lease M 15377 (ND), pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to A. G. Golden for deposits underlying the railroad right-of-way of the Northern Pacific Railway Company[2] in the N 1/2 sec. 8, T. 139 N., R. 98 W., 5th P.M., Stark County, North Dakota.[3]

Cardinal Petroleum Company appeals from a decision dated January 14, 1971, whereby the Montana land office dismissed its protest against issuance of oil and gas lease M 15944 (ND) pursuant to the Act of May 21, 1930, *supra*, to Tenneco Oil Company for deposits underlying the Burlington Northern railroad right-of-way in the S 1/2 sec. 6, T. 139 N., R. 98 W., 5th P.M.

As both appeals present the same issue, they will be treated in this single decision.

In dismissing the protests, the land office relied on the holding by the Director, Bureau of Land Management, in *Union Pacific Railroad Company*, Wyoming 0294508 (Nebraska) (February 20, 1968), which held that where the railroad right-of-way was granted under the Acts of July 1, 1862, 12 Stat. 489, and of July 2, 1864, 13 Stat. 356, and a part of the surface was subsequently patented, the oil and gas deposits underlying such railroad right-of-way are subject to leasing only by the Secretary of the Interior pursuant to the Act of May 21, 1930, *supra*.

---

2. Burlington Northern, Inc., is the corporate name of the present successor to the Northern Pacific Railway Company.

3. Northern Pacific Railway Company, successor in interest to the railroad right-of-way, has assigned its right to apply for a Federal oil and gas lease underlying the right-of-way in sec. 8, T. 139 N., R. 98 W., 5th P.M., to A. G. Golden by an instrument dated December 31, 1969, and in section 6, same township, to Tenneco Oil Company by an instrument dated November 20, 1969.

The Act of July 2, 1864, 13 Stat. 365, granted to a predecessor of the Burlington Northern a 400-foot right-of-way for construction of a railroad line from Lake Superior to Puget Sound. The plat of survey of T. 139 N., R. 98 W., 5th P.M., approved by the Commissioner of the General Land Office October 29, 1884, shows the center line of the right-of-way traversing the S 1/2 section 6 and the N 1/2 section 8 of the township. The railroad was constructed and has not been abandoned. Construction of the railroad antedated by several years the inception of rights under the homestead or any other public land laws to any of the lands in said S 1/2 section 6 or the said N 1/2 section 8. Patents in satisfaction of perfected homestead entries pursuant to the General Homestead Act of May 20, 1862, 43 U.S.C. § 161 *et seq.* (1970), were issued for the subject lands as follows: SE 1/4 section 6: Patent 3177, July 8, 1895; lots 6, 7 E 1/2 SW 1/4, section 6: patent 3662, June 23, 1898; N 1/2 N 1/2 section 8: patent 113254, February 23, 1910; and S 1/2 NE 1/4 section 8: patent 5893, February 24, 1903. None of the patents contained any reference to the railroad right-of-way, nor did they mention any reservation of the minerals underlying the right-of-way.

The question thus presented is whether the Secretary of the Interior has authority under the Act of May 21, 1930, *supra*, to dispose of oil and gas deposits underlying the right-of-way of the Burlington Northern as property of the United States, or whether the Secretary lacks such authority because the minerals retained by the United States under the railroad right-of-way grant passed to the subsequent patentees of homestead entries embracing the legal subdivisions traversed by the right-of-way.

The question is similar to that resolved by the Bureau of Land Management in *Union Pacific, supra*. The de-

cision relied on *Union Pacific Railroad Company,* 72 I.D. 76 (1965), which held that the Secretary of the Interior has authority under the Act of May 21, 1930, to dispose of deposits of oil and gas underlying the right-of-way granted to the Union Pacific Railroad Company pursuant to the Acts of July 1, 1862, and July 2, 1864, even though the lands traversed by the right-of-way were later granted to Wyoming as school lands. In the Bureau decision it was pointed out:

> The legality of the Department's conclusions in *Union Pacific Railroad Company, supra,* was challenged in the Courts in litigation styled *State of Wyoming and Gulf Oil Corporation* v. *Udall, et al.,* in the United States District Court for the District of Wyoming. That Court held that grant of school land to the State of Wyoming, under a grant specifically exempting mineral lands, exempted mineral rights in a previously granted railroad right-of-way (255 F. Supp. 481 (1966)). This conclusion was affirmed by the Court of Appeals for the Tenth Circuit (379 F. 2d 635 (1967)). On December 4, 1967, the United States Supreme Court denied *certiorari.*
>
> In *Union Pacific Railroad Company, supra,* at page 80, it is held that a comparison of *Great Northern Railway* v. *United States,* 315 U.S. 262 (1942) (which held that rights-of-way granted under the Act of March 3, 1875 (43 U.S.C. §§ 934-939) are easements only, not fees) and *United States* v. *Union Pacific Railroad,* 353 U.S. 112 (1957), demonstrates that the latter case "left unaltered the rule that a right-of-way granted under the 1862 and 1864 acts, *supra,* separated the land from the public domain and that subsequent grantees of lands traversed by the right-of-way gained no rights in it." It was further held,

at page 81, that just as the Supreme Court held in *Northern Pacific Railway* v. *Townsend,* 190 U.S. 267 (1903), that a subsequent homestead patentee cannot acquire rights against the railroad, so, in the case before the Department, "the State, a subsequent grantee, can acquire no rights against the United States which holds all the interest in the right-of-way not held by the railroad." It was concluded that:

> Whatever the exact nature of the estate created by the 1862 and 1864 acts may be, it is clear that it is more than an easement and sufficient to take the lands covered by the right-of-way out of the category of public lands subject to further disposition to the State. 72 I.D. at 81.

The appellants concede that the railroad was constructed many years before the United States issued patents to the homestead entrymen, and that the patents are subject to the railroad right-of-way even though it is not specifically mentioned in the patents. But they contend that as no rights to the oil and gas were conveyed by the United States by the grant of land for a right-of-way, the rights to the oil and gas must have passed to the original patentees by the instruments which had no reservation of such oil and gas to the United States, and now they, through mesne conveyances, have acceded to the title to the oil and gas deposits. They argue that the 1930 Act is inapplicable here and that such a view was expressed by the Director, Bureau of Land Management, in a letter dated March 28, 1968, to Mr. John L. Sherman, an attorney of Dickinson, North Dakota, in which it was stated, in regard to the N 1/2 N 1/2 sec. 8, T. 139 N., R. 98 W., 5th P.M., "since the patent did not contain a reservation of the oil and gas to the government, the 1930 Act is not applicable, and the question whether the Northern Pacific Rail-

way has a preferential right to a lease of such deposits is therefore moot." The appellants further argue that *United States* v. *Union Pacific Railroad Company*, 353 U.S. 112, holds that the United States retained the oil and gas deposits under the right-of-way as against the railroad company but it does not hold that when the interest of the United States in the subdivision was conveyed by patent to a homestead entryman, the oil and gas under the right-of-way was retained. Further, they argue that *Wyoming* v. *Udall*, 379 F.2d 635 (10th Cir. 1967), *cert. denied*, 389 U.S. 985 (1967), does not support the land office decision, because it turns only on the narrow issue that the State school land grant did not attach to lands previously sold or disposed of by the United States, and for which the State of Wyoming could select indemnity lands in lieu therefor. They assert the decision is more of an interpretation of the State Enabling Act than the railroad right-of-way act. They suggest that *Northern Pacific* v. *Townsend*, *supra*, dealt principally with the question of adverse possession under state law, and the nature of a right-of-way easement granted to a railroad had not been defined in 1903, when *Townsend* was decided.

The major contention of the appellants that the rights to the oil and gas deposits underlying the railroad right-of-way passed from the United States with the land patents, was rejected by the Department in the *Union Pacific* case, *supra*. Although in *Wyoming* v. *Udall*, *supra*, the Court relied on certain provisions of the Wyoming State Enabling Act of July 10, 1890, 26 Stat. 222, to buttress its conclusion, it did not reject the Department's position that the land in the right-of-way was taken out of the category of public lands. The Court also noted that the railroad has under the right-of-way grant the right to explore for coal and iron and to extract them if discovered. It said, "Such right [right-of-way grant] is in a

different category from a surface easement." 379 F.2d at 640. This conclusion supports the Department's holding that a pre-1875 right-of-way is more than an easement; it is an interest sufficient to remove the land it covers from the category of public land available for disposition under the general land laws.

A leading definitive study of the mining laws, after discussing railroad rights-of-way, states:

> It is to be concluded that mineral rights in a right-of-way such as was involved in the Union Pacific decision and any others [e.g., Northern Pacific] to which the ruling may be extended, are presently held by the United States. Since there is no statutory authority for location of reserved minerals apart from the surface, no mining claim may be made, but the right-of-way may be leased for oil and gas development pursuant to the Right-of-way Leasing Act of 1930. I American Law of Mining, at 492. (A footnote refers to Phillips Petroleum Company, 61 I.D. 93 (1963)).

As the right-of-way grant to the Northern Pacific was made by the 1864 Act, which was similar in all respects, mutatis mutandis, to the 1862 and 1864 Acts which granted the right-of-way to the Union Pacific, the ruling in *Union Pacific, supra,* affirmed in *Wyoming* v. *Udall, supra,* is controlling here. The land office correctly issued a lease under the 1930 Act for the oil and gas deposits lying within the limits of the Northern Pacific right-of-way in section 8, and likewise may correctly issue a lease for the oil and gas deposits underlying the right-of-way in section 6, township above named.

We do not know the circumstances which prompted the letter of March 28, 1968, from the Director, Bureau of Land Management, to Mr. Sherman, nor its apparent

conclusion that the 1930 Act was not applicable to the tract therein named, and under discussion here. However, it is at variance with the views expressed herein and does not bind the Department.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decisions of the land office are affirmed.

/s/ Francis E. Mayhue
Francis E. Mayhue
Member

We concur:

/s/ Martin Ritvo
Martin Ritvo
Member

/s/ Edward W. Stuebing
Edward W. Stuebing
Member (concurring specially)

Edward W. Stuebing, concurring.

The result reached in this case is wholly out of consonance with the law which would apply to an identical fact situation involving different parties. But because the case law dealing with federally created railroad rights-of-way has treated the status of such land as somehow unique, a crucial element of complexity has been infused into what otherwise would be a straightforward legal problem of elemental simplicity.

A owns Blackacre in fee simple absolute. A conveys to B an interest of less than the whole fee in a portion of Blackacre, A retaining an interest which includes the oil and gas and certain other minerals and a right of reversion. Subsequently, A conveys the entirety of Blackacre to C in

fee simple without reservation or exception. Query: Does A thereafter own the oil and gas underlying that portion of Blackacre involved in the limited conveyance to B and included in the subsequent conveyance to C?

The answer, of course, is that A cannot own the oil and gas, having conveyed all interests in the property to either B or C. If it were held that, despite these conveyances, A nevertheless retained an implied estate in Blackacre, the law of real property in the United States would be cast into a state of irreconcilable turmoil and confusion, and virtually no title would be certain. But in our analogy A is the United States, B is the railroad, the limited interest conveyed to B is a railroad right-of-way, Blackacre represents the entire legal subdivision upon which the right-of-way is imposed and which is then conveyed to the homestead entryman, C; and out of these relationships a special body of case law has evolved.

The departure from the usual application of the law relating to the conveyancing of real property had its inception in the ensuing confusion over just what sort of an estate in the land was created by the statutes conferring upon the railroads the rights-of-way over public lands. As noted in the main opinion, the Supreme Court, in *Northern Pacific* v. *Townsend*, 190 U.S. 265, 270 (1903), said:

> At the outset, we premise that, as the grant of the right-of-way, the filing of the map of definite location, and the construction of the railroad within the quarter sectioning question preceded the filing of the homestead entries on such section, the land forming the right-of-way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within

the right-of-way because of the fact that the grant to them was of the full legal subdivisions.

Although we are unable to perceive how the foregoing was necessary, or even contributory to the rationale of the decision in that case, the fact remains that the Court so stated, and that statement has served to define the rights of the parties in a succession of subsequent cases. It was also in this case that the railroad right-of-way was conceived to be a grant "of a limited fee, made on an implied condition of reverter," a concept which has been so eroded by later decisions as to have been virtually negated.

In *Wyoming* v. *Udall*, 379 F.2d 635 (10th Cir. 1967), the Court said that the concept that the right-of-way was a limited fee with an implied reverter became "unnecessary" when the meaning of "easement" was expanded. However, while so dismissing the limited fee concept, the Court continued to adhere to the idea that the creation of the right-of-way had the effect of removing the land so burdened from the public domain, so that the grant of a state school section would not be effective as to the right-of-way, even if limited to the subsurface minerals.

Justice Douglas, author of the Supreme Court's opinion in *United States* v. *Union Pacific R. Co.*, 253 U.S. 112 (1957), discussed the limited fee concept created by the Court in a line of earlier decisions stating, "the most that the 'limited fee' cases decided was that the railroads received all surface rights to the right-of-way and all rights incident to the use for railroad purposes." *Id.* at 119. The Court held that the grant of the right-of-way through the public lands did not convey the title to oil and gas deposits underlying the right-of-way, and that the railroad company could not remove or dispose of such deposits.

In this context it is informative to note that in Justice Frankfurter's dissent from the Court's decision in the 1957 *Union Pacific* case he quotes a colloquy from the House debate on the bill which became the Act of March 3, 1909, 35 Stat. 844, as illustrative of the fact that theretofor the United States did not separate the surface ownership from the ownership of the subsoil and that such a concept was a novelty in 1909. A portion of this colloquy follows:

> Mr. Mondell [of Wyoming, Chairman of the House Public Lands Committee] . . . this bill simply provides that in any case where, subsequent to the location or the entry, the character of the land has been called into question the entryman may if he so allege accept a limited patent. It is the first legislation before Congress providing for a limited patent or a patent reserving the mineral . . . .
>
> Mr. Stevens of Texas. Is it not a fact that valuable minerals are reserved now to the Government?
>
> Mr. Mondell. No; that is not true. The patent having issued, the patent carries everything in the land with it . . . .
>
> . . . .
>
> In other words, the patents issued by the Government of the United States heretofor have been patents in fee. 43 Cong. Rec. 2504.

The homesteaders in these cases, who came after the railroad was in place and entered subdivisions which were bifurcated by the right-of-way, applied for patent to and were granted the entirety of the subdivisions affected, for which they paid fees and commissions on a per-acre basis, as required by the land office. The fact of payment is not as significant as the fact that payment was charged and made for each individual acre in the subdivision.

Why did they pay $2.50 for each acre occupied by the railroad? The apparent answer is that the homestead statute requires that the entered lands be contiguous. Unless the lands occupied by the right-of-way were included in the entries the lands on either side would be separated by the right-of-way and non-contiguous. Therefore, the land office required the entrymen to include the right-of-way in their entries and pay the fees for that land, and it issued the patents for the entirety.

There are two ways to view the Department's treatment of this matter. We can assume that the land department believed that the railroad owned the fee and, despite this belief, it charged the homesteaders for the land and issued a patent which only confused the title and conveyed nothing within the right-of-way, and that it did so for the sole purpose of masking its failure to apply the plain prohibition against non-contiguity contained in the homestead law, a law which it was charged with administering. I reject this explanation, but this is the one which best comports with the majority view holding that the patentees took nothing in the right-of-way despite their payments and issuance of patents therefor. The only other explanation is that the land department recognized that the United States retained an interest in the land occupied by the right-of-way, and further recognized that by including this interest in the entry and conveying it in good faith to the entrymen it could serve as a legitimate link between the two portions which would otherwise be non-contiguous. This is, by far, the more credible explanation.

If we accept the latter explanation as correct, we see that the imposition of the railroad right-of-way did not remove the land from the category of public land because the Department thereafter dealt with it as public land

in conveying it under authority of the statute relating exclusively to the public land. It is now settled law that the United States did retain an interest, or servient estate, in the land granted to the railroad for right-of-way purposes. *United States* v. *Union Pacific R. Co., supra.* It follows that if it conveyed any interest to the homesteaders it conveyed all that it had, including the oil and gas, as the separation and reservation of minerals was not then a feature of federal conveyancing, and because the conveyance was not made subject to any reservations or exceptions.

In discussing the nature of the right-of-way granted to the railroads by the Act of March 3, 1875 (18 Stat. 482), the Department said:

> A railroad company to which a right-of-way is granted does not secure a full and complete title to the land out of which the right-of-way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purposes and may hold such possession, if it is necessary to that use, only as long as that use continues. The Government conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right-of-way has attached, take the same subject to such right-of-way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. 37 L.D. 787, 788 (1909).

I submit that in light of the analysis by the Supreme Court in *United States* v. *Union Pacific R. Co., supra,*

the nature of the grant to the railroads under the 1862 and 1864 Acts did not differ materially from the right acquired by the railroads under the 1875 Act. In each instance all that the railroads got was the surface right to the right-of-way to use for railroad purposes (in addition to the iron and coal). In each instance an estate in the land remained vested in the United States. There is no discernible reason why this estate could not have passed to the patentee of the United States regardless of the statute by which the railroad happen to acquire its right-of-way.

A further test of the effect of the patents issued to the entrymen is to hypothesize the result of the railroad's abandonment of the right-of-way. Would the United States, having spread on the records patents evincing ownership in private individuals, then be heard to assert ownership of the entirety of the lands previously dominated by the right-of-way? And, if so, could such an assertion be sustained?

In view of the present definition of the nature of the right acquired by the railroads under the 1862 and 1864 Acts there is no longer any need to continue to assert that the United States did a vain and useless thing when it issued its patents to include the lands here at issue.

A conclusion that patents issued prior to 1930 without a reservation of minerals for lands traversed by railroad rights-of-way operated to convey titles to the oil and gas thereunder would do no violence to the Act of May 21, 1930; 46 Stat. 373, 30 U.S.C. 301 (1964). The Act would have continued application to federal lands and to lands conveyed with the reservation of oil and gas to the United States.

Nevertheless, while maintaining my personal dissatisfaction with the current state of the law in this area, I am obliged to recognize that it is correctly expressed in the main opinion and that the strictures of stare decisis bind us to this conclusion. While certain distinctions can be drawn between the circumstances which prevailed in the landmark cases cited in the principal opinion and those which obtain in these cases, the distinctions are not such as would reasonably provide a basis for a different result.

Accordingly, I must add my concurrence, albeit reluctantly.

APPENDIX C

Sections 1 and 2 of the Act to Secure Homesteads on the Public Domain of May 20, 1862, 12 Stat. 392:

May 20, 1862.

CHAP. LXXV.—*An Act to secure Homesteads to actual Settlers on the Public Domain.*

Certain persons may enter certain quantities of certain unappropriated public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim, or which may, at the

time the application is made, be subject to preemption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: *Provided,* That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Such persons to make affidavit.

Contents of affidavit.

SEC. 2. *And be it further enacted,* That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided, however,* That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such

Certificates and patents, when to issue and upon what proof.

time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: *And provided, further,* That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall enure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified.

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ision in death of nt, &c.

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APPENDIX D

Sections 2 and 3 of the Act Granting Lands to Aid the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route of July 2, 1864, 13 Stat. 365:

SEC. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and pub-

lic stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided,* That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further,* That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided, further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd

numbered sections, nearest to the line of said road may be selected as above provided: *And provided, further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further,* That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

United States
To
Bartholomew O'Connell

HOMESTEAD PATENT.

HOMESTEAD CERTIFICATE No. 5893 APPLICATION 9890

The United States of America.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas, *There has been deposited in the General Land Office of the United States, a Certificate of the Register of the Land Office at* Bismarck North Dakota *whereby it appears that pursuant to the Act of Congress approved 20th May, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of* Bartholomew O'Connell *has been established and duly consummated in conformity to law, for the* South half of the North East quarter and the North half of the South East quarter of Section eight in Township one hundred and thirty nine North of Range ninety eight West of the Fifth Principal Meridian in North Dakota, containing one hundred and sixty acres

according to the Official Plat of the survey of said land returned to the General Land Office by the Surveyor General.

according to the Official Plat of the survey of said land returned to the General Land Office by the Surveyor General.

Now, Know Ye, *That there is therefore granted by the United States unto the said* Bartholomew O'Connell

the tract of land above described: TO HAVE AND TO HOLD the said tract of land, with the appurtenances thereof, unto the said Bartholomew O'Connell *and to* his *heirs and assigns, forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the rights of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States*

In Testimony Whereof, *I,* Theodore Roosevelt *President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.*

Given under my hand at the City of Washington, the twenty fifth *day of* February *in the year of our Lord one thousand* ~~eight~~ nine *hundred and* four *and of the independence of the United States the* one hundred and twenty eighth

UNITED STATES GENERAL LAND OFFICE SEAL

BY THE PRESIDENT. T. Roosevelt

By F. M. McKean *Secretary.*

North Dakota

Recorded, Vol. 156 *Page* 290 *Recorder of the General Land Office.*

Filed for record 25 day of Nov *A. D.* ~~1904~~ 1905, *at* 9 *o'clock* a *M.*

Transfer entered this 28 day of Nov 1905

W. F. Burnett *Register of Deeds.*

By F. H. Neil *Deputy.*

J. S. White
County Auditor

Patent No.
17332

(4—405. A.)

THE UNITED STATES OF AMERICA,

To All to Whom These Presents Shall Come, Greeting:

Dickinson 02296
~~Homestead Certificate No.~~ .....
~~Application~~ .....

Whereas, There ..... has been deposited in the General Land office of the United States a Certificate of the Register of the Land Office at Dickinson, North Dakota, whereby it appears that pursuant to the Act of Congress approved ~~May 20th~~ 20th May, 1862, "To secure Homesteads to actual Settlers on the Public Domain", and the acts supplemental thereto, the claim of Samuel H. Gilman has been established and duly consummated, in conformity to law, for the North East quarter of the North East quarter and the North half of the North West quarter of Section eight in Township one hundred thirty-Nine North of Range ninety-one West of the Fifth Principal Meridian, North Dakota, Containing one hundred sixty Acres,

according to the Official Plat of the Survey of the said land, returned to the General Land Office by the Surveyor General: .....

NOW KNOW YE, That there is, therefore, granted by the United States unto the said Samuel H. Gilman ..... the ~~said~~ Tract of Land above described: To have and to hold the said Tract of Land, with the appurtenances thereof, unto the said Samuel H. Gilman, ... and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

APPENDIX E

NOW KNOW YE, That there is, therefore, granted by the United States unto the said Samuel W. Gillmore the said Tract of Land above described: To have and to hold the said Tract of Land, with the appurtenances thereof, unto the said Samuel W. Gillmore and to his heirs and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twenty-third day of February in the year of our Lord one thousand nine hundred and [illegible] and of the Independence of the United States the one hundred and [illegible]

UNITED STATES GENERAL LAND OFFICE SEAL

By the President. Wm. H. Taft

By C. J. Crump, Acting Secretary.

Recorded: Patent No. 113207 Vol. ..... Page .....

W. W. Vineyard, Recorder of the General Land Office.

AUDITOR'S OFFICE, STARK COUNTY, N. D.

Transfer entered this ..... day of ..... 190...

..... County Auditor.

Filed for record this 15 day of April A. D. 1912, at 11 o'clock A. M., and recorded in Book 17 of Patents on Page .....

By ..... Deputy.

..... Register of Deeds.

FILE COPY

AUG 6 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

TONY RICE, GEORGE W. ZARAK, ARLENE ZARAK, WILLIAM ZARAK, JR., and DARLENE ZARAK,
Petitioners,

vs.

UNITED STATES OF AMERICA; ROGERS C. B. MORTON, As Secretary of the Interior; BURTON W. WILCOCK, Director of Bureau of Land Management; EDWIN ZAIDLICZ, State Director, Bureau of Land Management; EUGENE NEWELL, Chief, Division of Technical Services, Bureau of Land Management; and BURLINGTON NORTHERN, INC.,
Respondents.

BRIEF OF BURLINGTON NORTHERN, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. FARRELL
Burlington Northern, Inc.
176 East Fifth Street
St. Paul, Minnesota 55101
612-227-0911

E. T. COMMY, JR.
600 First National Bank Building
Fargo, North Dakota 58102

Attorneys for Respondent Burlington Northern, Inc.

R. L. Mathenhall, Inc., 928 Cherry Street, Kansas City, Mo. 64106, 471-2620

In the Supreme Court of the United States

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Respondents.

BRIEF OF BURLINGTON NORTHERN, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner says that the decision of this Court in *United States* v. *Union Pacific Railway Company*, 77 S. Ct. 685, 353 U.S. 112, was ignored by the Circuit Court of Appeals and that its decision is "in conflict with the existing and prevailing law of this court" as set forth in the *Union Pacific* case. (See pages 9, 10, 11, 12 & 13 of Petition). The petition, however, fails to point out with any clarity, where the *Union Pacific* case is in conflict with

the *Northern Pacific Railway* v. *Townsend,* 190 U.S. 267, and why the *Townsend* case is not still the existing law of this Court.

It should be noted that the trial court, U. S. Judge Van Sickle, quoting from *Hastings & D. R. Co.* v. *Whitney,* 132 U.S. 357 (1889), which cites *Wilcox* v. *Jackson,* 38 U.S. 425 (1839), held that the right of way granted to the Northern Pacific Railroad Company was severed from the mass of public lands, and, therefore, a conveyance by patent of a section of land through which the granted right of way extended without a reservation of the right of way by the United States did not operate to convey the minerals in the right of way to the patentee.

Petitioner contends that the *Union Pacific* case reversed previous holdings that the railroad owned all minerals under the right of way and that this reversed the *Townsend* case as it was not applicable to a mineral case. (Page 10 (2) and pages 12 and 13 of Plaintiff's Petition).

The specific holding in the *Townsend* case was that when right of way is granted the land forming the right of way is taken out of the category of public land subject to preemption and sale and homesteaders thereafter can acquire no interest in land within the right of way on the ground that the grants were of a full legal subdivision which included part of the right of way.

In the *Union Pacific* case, this Court clearly held that the Railroad acquired no mineral rights in the granted right of way, other than the rights to the coal and iron therein, and said that to hold otherwise would be contrary to the rule which states that land grants are to be construed favorably to the Government and nothing passes except what is conveyed in clear language and any doubts are resolved for the Government and not against it.

For the most part, the Petition for Certiorari is a repetition of what petitioners have said before. There appears to be one exception, however, that being that petitioners now have emphasized the words "in a body" as they appear in the Homestead Act of May 20, 1862 (12 Stat. 392). They contend that since the petitioners' predecessors in title to the lands granted to such predecessors under the Homestead Act must be pursuant to said Act, granted in one piece or "in a body", the homestead patentees acquired full title to the lands patented to them, including the minerals therein, even though bisected or traversed by the granted right of way.

Petitioners further state that there are only two statutes which are to be considered in deciding the case, they being the Homestead Act of May 20, 1862, *supra*, and the Northern Pacific Right of Way Act of July 2, 1864 (13 Stat. 365). Reference to the Act of March 8, 1922 (43 U.S.C.A. § 912, 42 U. S. Stat. 414) and the Right of Way Leasing Act (30 U.S.C.A. §§ 301-306, 46 Stat. 373) is completely omitted. The latter two Acts are referred to in a veiled way and written off by petitioners at the bottom of page 12 of their Petition as "later legislation", stating that subsequent to the date of issue of the patents granted to petitioners' predecessors, legislation was enacted providing for the reservation of minerals by the United States in lands granted by the United States for railroad rights of way purposes. The petitioners by failing to make reference to the Act of March 8, 1922 and the Right of Way Leasing Act appear to be purposefully attempting to mislead the Court since both of those Acts are vital in arriving at a decision in this case.

The petitioners make reference in both their Statement of the Case and in their Reasons for Granting the Writ to the fact that only the Homestead Act and North-

ern Pacific Right of Way Act are to be considered, saying in the last full paragraph on page 7 of the Petition that "the decision turns entirely on the construction and application of the Homestead Act and the Railroad Right of Way Act, *supra*." Again, in the last full paragraph on page 9, petitioners state "There is no statute that justifies the lower court ruling and none is claimed to exist by the respondents." Said statements by petitioners obviously are erroneous and misleading. Respondents have relied on both the March 8, 1922 Act, *supra*, and the Right of Way Leasing Act, *supra*.

Under the heading of "Questions Presented" on page 3 of the Petition, in order to support the making of the Petition, it is stated that the question presented by the case "has never been previously litigated in the Federal Courts." The statement is not entirely true since the question as to ownership of minerals in railroad right of way granted by the United States has been previously litigated, two of the leading cases being *United States* v. *Union Pacific Railroad Company*, 353 U.S. 112, 77 S. Ct. 685, and *Great Northern Railway Company* v. *United States*, 315 U.S. 262, 62 S. Ct. 529.

In the paragraph beginning at the bottom of page 7 of the Petition, in an attempt to support petitioners' contention that the words "in a body" as they appear in the Homestead Act, *supra*, necessarily mean that a homestead patentee acquired the minerals under a granted railroad right of way traversing the lands included in a patent, it is stated that "It is acknowledged by all that the oil and gas under this right-of-way was never conveyed to the railroad." Petitioners then go on to infer that if homestead patentees do not acquire all of the minerals in the lands patented under the Homestead Act, even though traversed by a railroad right of way, that the words "in a body" are

meaningless. What petitioners do not say is that under the Act of March 8, 1922, which specifically reserves to the United States all minerals in lands under a granted railroad right of way upon the abandonment or forfeiture thereof, and under the Right of Way Leasing Act, title to the minerals in lands under a granted railroad right of way is in the United States.

At the top of page 9 of the Petition, it is stated that the lower court has ignored the *United States* v. *Union Pacific Railroad Company* case, *supra*, and relies solely upon the decision of *Northern Pacific Railway* v. *Townsend*, 190 U.S. 267. That, too, is an incorrect statement in that the *Union Pacific* case has been specifically mentioned in all of the decisions rendered by both Courts and the Interior Board of Land Appeals, including the decision of the Court of Appeals for the Eighth Circuit.

Incidentally, at both pages 10 and 12 of the Petition, the language from the *Townsend* case, *supra*, is erroneously quoted in that the word "fee" is not emphasized in the statement quoted from the decision and the sentence quoted from the decision does not begin with the word "It". Actually the quotation is taken out of context since the Court then goes on to arrive at its conclusion that what was granted to the Northern Pacific Railroad Company by the Act of July, 1864 was "of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Petitioners again at page 11 of their Petition, under paragraphs numbered 5 and 6, seemingly attempt to mislead the Court by expressly stating that there are no statutes which would contemplate the retention by the United States of minerals in the lands underlying a granted railroad right of way.

This holding that the right of way conveyance took the land out of the category of public lands has never been modified by this Court or any other court, to our knowledge. And it has been recognized and followed by the U. S. Court of Appeals as follows:

> "Wyoming and Gulf rest their case on the proposition that the location of a railroad right-of-way across a tract of public land of the United States does not separate the servient estate from the public domain with the result that the title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract. The United States and Union Pacific concede that this rule applies to post-1871 grants but deny its application to previous grants."
>
> "The railroad has the right to explore for coal and iron and if any is discovered it belongs to the railroad. Such right is in a different category from a surface easement. The grant of the coal and iron with the incidental rights of exploration and development disposed of a part of the section traversed by the right-of-way. This prior disposition served to exclude the right-of-way from the grant of school sections made by the Enabling Act."
>
> "The effect of this conclusion is that title to the servient estate did not pass with the conveyance of the encumbered tract. Instead, it remained in the United States and the United States retains the rights, specifically here the ownership of the underlying oil and gas, not granted to the railroad." *State of Wyoming* v. *Udall*, 379 F. 2d 639, 640 (10th Circuit, 1967).

It should be noted that this Court denied certiorari in this case in 389 U.S. 985, 88 S. Ct. 470, which means an affirmance of the rule in the *Townsend* case.

In the case *Cornelius* v. *Kessel,* it is said "The United States had no power to grant lands which it has previously granted to an individual." *Cornelius* v. *Kessel,* 128 U.S. 456, 9 S. Ct. 122.

After a railroad right of way grant "has attached to specific lands, however, no title thereto or rights therein can be obtained by persons entering them under the general land laws." *Public Lands,* 73 C.J.S., page 810.

> "All the vacant and unappropriated public lands not reserved or excepted are subject to entry under the land laws."
>
> "All the vacant and unappropriated public lands not reserved or excepted are subject to entry under the land laws. Public lands are open to settlement only when they are free from any other claims of record, and the fact that the title to land may be in the United States does not necessarily make it part of the public domain which is subject to entry or settlement."
>
> "'Unappropriated public lands' is a term which implies that the lands are subject to entry under the homestead laws of the United States."
>
> "Offered lands, in the practice of the United States Land Department, are lands which are subject to private cash entry at the minimum price." 73 C.J.S. 686.

And see *U. S.* v. *Curtner,* 38 F. 1 (Circuit Court California 1889) where the court said:

> "After the grant (of right of way) has attached to specific lands, no title thereto or rights therein can be obtained by persons entering them under the general land laws, nor can the United States grant or convey the lands to another person."

Based upon the foregoing, it is submitted that plaintiff's petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-137

TONY RICE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

By the Northern Pacific Act of July 2, 1864, 13 Stat. 365, 367, Congress granted to the Northern Pacific Railway a right-of-way 400 feet wide from Lake Superior to Puget Sound. After this right-of-way had been surveyed (and the land thus removed from the public domain) and the Railway, which is still in operation, had been built, the United States granted to petitioners' ancestor in title a 160-acre homestead patent to land through which the right-of-way runs, without mentioning the right-of-way. See *Rice* v. *United States,* 348 F. Supp. 254, 255. Petitioners argue that because of the government's error they are entitled to the minerals underlying the right-of-way.

In opinions on which we rely, the courts below affirmed the administrative decision of the Secretary of the Interior that the petitioners have no title to any part of the land withdrawn for the right-of-way, whether surface rights or rights to sub-surface minerals.

As the courts below held, once the right-of-way had been granted, the entirety of that land was withdrawn from the public domain. Whether or not the minerals under the right-of-way were conveyed to the railway, petitioners cannot benefit from the failure of the government to except the land on which the right-of-way was granted from the homestead grant to petitioners' ancestor in title. This Court has repeatedly held that once a tract of public land has been appropriated for a public purpose, it is severed from the mass of the public domain and is thereafter not subject to entry under another law providing for private acquisition of the public domain. *Northern Pacific Ry.* v. *Townsend,* 190 U.S. 267, 270; *Hastings Etc. Railroad Co.* v. *Whitney,* 132 U.S. 357; *Wilcox* v. *Jackson,* 13 Pet. 498; *Witherspoon* v. *Duncan,* 4 Wall. 210; *Carroll* v. *Safford,* 3 How. 441; *United States* v. *Union Pacific Railroad Company,* 353 U.S. 112; and *Wyoming* v. *Udall,* 379 F. 2d 635 (C.A. 10), certiorari denied, 389 U.S. 985. The fact that, years after the grant to petitioners' ancestor, it was determined that the government and not the railway would have the mineral rights under the right-of-way (see *United States* v. *Union Pacific Railroad Co., supra*), does not imply that those rights would inure to petitioners.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.